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No. 83-638

# In the Supreme Court of the United States

October Term, 1983

ALCAN ALUMINIUM LIMITED,
*Petitioner,*

vs.

THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Operating through its New York Office; FRANK GOODMAN, Individually, and as District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GEOGHEGAN, individually, and Supervisor-Audit Group, New York Office of the Franchise Tax Board of the State of California,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## REPLY BRIEF OF PETITIONER

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### INTRODUCTORY STATEMENT

On December 5, 1983, this Court denied an Application for a Writ of Certiorari in *Shell Petroleum N.V. v. Franchetti*, No. 83-586. Although that case posed similar issues, there are fundamental differences which allow the instant case to stand on its own merits.

## RIPENESS

The Ninth Circuit dismissed Shell N.V.'s case because the court held it was not ripe for adjudication. There is *no* ripeness issue in the instant case.

## STANDING

In *Shell* the Ninth Circuit stated in dictum that Shell N.V. did not have standing to enforce the treaty provisions of the Foreign Commerce and Navigation Treaty between the United States and the Government of the Netherlands. In contrast, the Second Circuit decided that the Petitioner, Alcan Aluminium Limited ("ALCAN"), did not have standing because, according to the Court, the unitary tax imposed by California was exclusively a domestic tax that did not result in any burdens on foreign commerce and, therefore, did not unconstitutionally burden Petitioner.

Although cloaked in the jargon of standing, the issues before the Court in the instant case are not simply procedural. Alcan has asserted that Respondents' method of taxation burdens its activities, which are exclusively in foreign commerce; Alcan has standing because it is directly injured.[1] The Respondents have asserted, and the lower courts have ruled, that the unitary tax is exclusively a domestic tax with no burdens on foreign commerce, and,

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1. Respondents attempt to apply the doctrines of *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) and *Valley Forge College v. Americans United*, 454 U.S. 464 (1982) is completely misplaced. First, both cases involve factual settings which are totally inapplicable to this situation. Second, the legal doctrine in both cases turns on the absence of an allegation of direct injury, an allegation which clearly exists in this case.

therefore, Petitioner is not directly injured, rather it is only injured as a shareholder. Thus, in contrast to the *Shell* case, the instant case presents a fundamental Foreign Commerce Clause challenge to combined worldwide apportionment.

## DOMESTIC SUBSIDIARY'S STATE COURT ACTION

Respondents' position that Foreign Commerce Clause objections are properly raised by the Petitioner's domestic subsidiary ("ALCANCORP") in its state action has no merit. If the lower courts and Respondents are correct that Petitioner's only injury is that of a shareholder and that the tax has no foreign commerce consequences, then no foreign commerce issue exists to be raised by Alcancorp. The Foreign Commerce Clause issue must be resolved in the instant case.

## CONCLUSION

This case, unlike *Shell*, presents the exact issue the Court left unresolved in its recent decision in *Container Corporation of America v. Franchise Tax Board*, ..... U.S. ....., 77 L. Ed. 2d 545, 103 S. Ct. 2933 (1983): the application of combined worldwide apportionment to domestic subsidiary—foreign parent combinations. Although characterized as a standing issue, the heart of the controversy, in fact, is the existence or non-existence of unconstitutional burdens on foreign commerce. This issue is properly before the Court; there is no ripeness issue in this case; and there is no merit to the proposition that this issue can be raised by the domestic subsidiary in a manner consistent

with the reasoning of the lower courts. The Court should issue a Writ of Certiorari.

Respectfully submitted,

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